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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 IN THE MATTER OF:

)  
10 ) Supreme Court No. R-12-0018  
11 )

11 PETITION TO AMEND  
12 COMMETN [3] TO ER 8.4, RULE  
13 42, ARIZONA RULES OF THE  
14 SUPREME COURT  
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)  
11 **Comment in Opposition to Petition to**  
12 **Amend Comment [3] to ER 8.4, Rule 42,**  
13 **Arizona Rules of the Supreme Court**  
14 )  
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16 I, Gaetano Testini, on behalf of Los Abogados Hispanic Bar Association, Inc., hereby  
17 submit the following comment in opposition to the Petition to Amend Comment [3] to ER 8.4, Rule  
18 42, Arizona Rules of the Supreme Court. The Petition was submitted by Arizona State Bar Member  
19 Cathi W. Herrod, and is worded as set forth below.

20 “A lawyer may violate this Rule when, in the course of representing a client, (a) the  
21 lawyer uses words or engages in conduct that the lawyer knows or should have known  
22 invidiously discriminates against, threatens, harasses, intimidates, or defames an  
23 individual and (b) those words or that conduct creates a substantial likelihood of  
24 material prejudice to the administration of justice by undermining the impartiality  
25 of the judicial system. This Rule does not preclude legitimate advocacy. This Rule  
shall not limit or impair the right of a lawyer to accept, decline, or withdraw from the  
representation of a client. A trial judge’s finding that peremptory challenges were  
exercised on a discriminatory basis does not alone establish a violation of this Rule.”

1 The current wording of Comment [3] to ER 8.4, Rule 42, Arizona Rules of the Supreme  
2 Court, is

3 “A lawyer who in the course of representing a client, knowingly manifests by words  
4 or conduct, bias or prejudice based upon race, sex, religion, national origin, disability,  
5 age, sexual orientation, gender identity or socioeconomic status, violates paragraph  
6 (d) when such actions are prejudicial to the administration of justice. This does not  
7 preclude legitimate advocacy when race, sex, religion, national origin, disability, age,  
sexual orientation, gender identity or socioeconomic status, or other similar factors,  
are issues in the proceeding. A trial judge’s finding that peremptory challenges were  
exercised on a discriminatory basis does not alone establish a violation of this Rule.”

8 Paragraph (d) of ER 8.4, referenced in Comment [3], provides that it is professional misconduct for  
9 a lawyer to “engage in conduct that is prejudicial to the administration of justice.”

10 Several justifications have been debated for the proposed amendment to Comment [3]. One  
11 is that it is more inclusive, i.e., that it protects everyone. However, as those who have endured  
12 discrimination painfully know, to water-down proscriptions against bias by substituting language  
13 that ostensibly protects everyone is misguided for it protects no one who is a member of a group  
14 historically subjected to unequal treatment. This is precisely why it is important to a society  
15 dedicated to equal treatment for all that classes of persons who have been singled-out for unequal  
16 treatment be identified. How else can the lamentable weakness of human nature, so often  
17 succumbing to discrimination against those considered to be different, be redirected to its higher  
18 purpose? To refuse to recognize historically mistreated classes is to refuse to admit that there are  
19 any such classes. It is to abdicate the struggle to achieve equality. The Arizona Rules of  
20 Professional Conduct ought offer no safe harbor to such a result.

22 Another proffered justification for the proposed change to Comment [3] is the supposed  
23 “problem” or inconvenience of adding new protected groups as society comes to terms with their  
24 legitimate inclusion among protected categories. But it is the scourge of discrimination that is the  
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1 real problem, not society's discomfort with being true to its collective conscience. Quite the  
2 contrary, to admit that many among us are treated unfairly, and to stop the unfairness, is the  
3 greatness of our country. For it to be considered inconvenient or a nuisance is to trivialize what our  
4 fellow Americans unjustly suffer at the hands of their countrymen, and is to make the rest of us less  
5 American.

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7 Then there is the contention that members of the bar should be subject to professional  
8 discipline for "serious offenses" and should not face the slings and arrows of official misconduct  
9 merely because someone finds their conduct "subjectively offensive." It is clear that those who  
10 make such defenses of the proposed amendment to Comment [3] are not the victims of  
11 discrimination. We have news for them; discrimination leaves scars. It hurts in ways that the  
12 majority cannot begin to imagine. If this were understood or at least acknowledged, unequal  
13 treatment would not be placed on a par with something that is merely "subjectively offensive," nor  
14 would it be diminished to something that is less than a "serious offense."

15 **RESPECTFULLY SUBMITTED** this 21st day of May, 2012.

16 LOS ABOGADOS HISPANIC  
17 BAR ASSOCIATION, INC.

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19 By: *Gaetano J. Testini*  
20 Gaetano J. Testini, President  
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